IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE	)	
CARE AND TREATMENT OF	)	No. SC 87415
ALBERT BERNAT,	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE JON A. CUNNINGHAM, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Albert Bernat appeals the judgment and order of the Honorable Jon A. Cunningham following a jury trial in St. Charles County, Missouri, committing Mr. Bernat to secure confinement in the custody of the Department of Mental Health as a sexually violent predator. This Court accepted this appeal upon Mr. Bernat's Application for Transfer from the Eastern District Court of Appeal, and this Court has jurisdiction over this cause pursuant to Article V, Section 10, Mo. Const. (as amended 1976).

STATEMENT OF FACTS

Lisa Henderson was eighteen years old in December of 1985 (2001 Tr. 6).[1] She was walking to her boyfriend's house after church on December 16 (2001 Tr. 6-7). The weather was cold with ice and snow on the ground, and a man about her father's age pulled over and asked if she needed a ride (2001 Tr. 7-9). Albert Bernat was driving the car (2001 Tr. 8-9). Ms. Henderson got in the car and told Mr. Bernat where to drive (2001 Tr. 9-10). Mr. Bernat did not follow her directions and turned before reaching her boyfriend's house (2001 Tr. 10-11). Mr. Bernat handcuffed Ms. Henderson and forced her to the floor of the car at gunpoint (2001 Tr. 11). Mr. Bernat took her to his trailer where he forced her to undress and engage in oral and vaginal intercourse (2001 Tr. 13-14). Ms. Henderson later reported the incident to the police and on August 8, 1986, Mr. Bernat pleaded guilty to forcible rape (2001 Tr. 14-15, L.F. 10).

Mr. Bernat completed phase I of the Missouri Sexual Offender Program (MOSOP) in prison (2001 Tr. 226). He began phase II in 1990 but was terminated for violating the program's rule of confidentiality (2001 Tr. 226-227). Mr. Bernat completed phase II of MOSOP in 1992 (2001 Tr. 228-229). At first, he was

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[1] The record on appeal consists of a legal file (L.F.), supplemental legal file (Sup. L.F.), a transcript of the trial on October 30 and 31, 2001, which ended in a mistrial (2001 Tr.), and a transcript of the June 24, 2003, trial (Tr.).

extremely guarded, but he later opened up in group (Tr. 228-229). Mr. Bernat admitted the full extent of his offense against his victim, began processing out the harmful effects of his behavior, and developed remorse and a determination to change (2001 Tr. 233). He developed self-esteem enabling him to acknowledge his own weakness (2001 Tr. 233). Mr. Bernat eagerly implemented restrictions on himself and relapse prevention techniques to minimize his risk of re-offending in the future (Tr. 233). His therapist reported that Mr. Bernat, "made very good use of the therapeutic experience" (2001 Tr. 233). Because Mr. Bernat was confined during this therapy he was still considered at moderate risk to re-offend upon release (2001 Tr. 233). The therapist noted that his old behavior was long-standing and it would take some time for his new habits to overcome those tendencies (2001 Tr. 234). The report concluded:

> At the present time [Mr. Bernat] appears well motivated to continue to change process. He has developed a support network in the community and comprehends and assents the necessity for monitoring his behavior.

(2001 Tr. 234).

Mr. Bernat was paroled from prison and referred to Donald Kannady, a licensed therapist, by the Parole Board to continue sexual offender treatment (Tr. 377-380). Mr. Kannady knew what Mr. Bernat had been convicted of (Tr. 389). Mr. Bernat seemed willing to participate in treatment and eager to get on with

his life (Tr. 381). Mr. Kannady counseled Mr. Bernat until late in 1995 (Tr. 381). He was very pleased with Mr. Bernat's performance; he attended group therapy sessions regularly and actively participated in the sessions (Tr. 382). Mr. Kannady recalled that Mr. Bernat had difficulty socializing, and was aware that Mr. Bernat was going to bars to meet women (Tr. 384-385). Mr. Bernat was providing urine samples to his parole officer, and only once was alcohol detected (Tr. 387). Mr. Bernat drank some O'Doul's non-alcoholic beer, unaware that it contained low amounts of alcohol (Tr. 387). Mr. Kannady was not concerned that Mr. Bernat may have been paying for sex because that was an outlet for sexual relations involving consenting adults (Tr. 385).

Mr. Bernat was accused of rape by a woman named Alana Little in 1995 (Tr. 276-277, 291). She claimed that Mr. Bernat offered her a ride home from a bar, but stopped at his trailer to feed his dogs (Tr. 277). Ms. Little claimed that after a few minutes Mr. Bernat got a gun from under the cushion on the couch and forced her to have sexual intercourse (Tr. 278). She said that Mr. Bernat told her that he had raped a woman in the eighties and when he let the other woman go she reported it to the police (Tr. 278). Ms. Little said that she told Mr. Bernat that she was his friend and he could trust her, and he took her home (Tr. 278-279). Mr. Bernat was tried for raping Ms. Little, but he was acquitted by a jury at trial (Tr. 326-327). Ms. Little's co-workers told Mr. Bernat's attorney in that case

that she used her job as a means of socializing and she used drugs everyday at work, usually methamphetamine (Tr. 574). Ms. Little was always hanging on some new guy at the bar, and left with a different man every night, but only those who would give her money or drugs (Tr. 574). Mr. Bernat's parole was revoked and he was returned to prison (Tr. 333).

Mr. Bernat was scheduled for release from prison on December 13, 2000 (L.F. 10). The State filed a motion on December 11 to involuntarily commit Mr. Bernat to secure confinement in the custody of the Department of Mental Health (DMH) as a sexually violent predator (L.F. 9-12).

The case was tried to a jury from October 30 to November 1, 2001 (L.F. 5). The court declared a mistrial when the jurors were unable to reach a unanimous verdict (L.F. 5). The case was tried a second time on June 24, 2003 (Tr. 2). Mr. Bernat objected when the State sought to read the testimony of Linda Kelly at the first trial during the second trial (Tr. 210-214). He noted that Section 632.483 had been amended since the first trial to require that a psychologist or psychiatrist evaluate a person for referral to the Attorney General's office for further proceedings (Tr. 215-217). He argued that this requirement should extend to the level of trial as well, and that he should get the benefit of the change in the law (Tr. 216-217). Mr. Bernat suggested that Ms. Kelly's testimony should be excluded because she is a licensed clinical social worker, not a psychiatrist or

psychologist (Tr. 21-214). The probate court overruled the objection and admitted the testimony because the statute does not say anything about what is admissible at trial (Tr. 217-218).

Ms. Kelly prepared the End of Confinement report pursuant to Section 632.483 near the end of Mr. Bernat's prison term (2001 Tr. 198). The State asked Ms. Kelly whether she had reached "an opinion to a reasonable degree of scientific certainty as to whether or not Mr. Bernat suffered from a mental abnormality?" (2001 Tr. 200). Ms. Kelly said that she had, and she told the State that she believed Mr. Bernat's mental abnormality was paraphilia not otherwise specified (NOS) (2001 Tr. 200).

Ms. Kelly based her opinion on Mr. Bernat's behavior and fantasies, both historical and current (2001 Tr. 200). She said that Mr. Bernat admitted fantasies of a sexually violent nature from 1961 to the present (2001 Tr. 201). Ms. Kelly said that Mr. Bernat told her that he had sex with Ms. Little to pay a forty dollar debt she owed him for paying for a hotel room for her (2001 Tr. 202-203). She put in her report that Mr. Bernat said he "beat" the case by keeping a journal that proved other statements Ms. Little made were untrue (2001 Tr. 203-204). Ms. Kelly read the definition of the power reassurance rape typology to Mr. Bernat and he said that definition sounded like him (2001 Tr. 205-206). According to

that typology, the "purpose is to possess the victim sexually, not harm her. The offender uses sex to feel powerful and in control…." (Tr. 528).

Ms. Kelly wrote in her report that the 1995 incident was similar to the 1985 incident in that both women were picked up while hitch hiking and raped at Mr. Bernat's trailer (2001 Tr. 209). She knew that Mr. Bernat asked Ms. Little if she needed a ride home from a bar (2001 Tr. 209). She saw in Mr. Bernat's classification file that he was found guilty after a trial, but wrote in her report that no reason was given "in any of the files" she reviewed for the case being discharged (2001 Tr. 210-212). Ms. Kelly wrote that Mr. Bernat was terminated from MOSOP phase II the first time for lack of participation, not for violating the confidentiality rule (2001 Tr. 227). She wrote in her report only that Mr. Bernat began phase II the second time extremely guarded but eventually opened up (2001 Tr. 229). Ms. Kelly wrote in her report that Mr. Bernat would lie about his past in the rape and minimize his coercive and exploitive behavior (2001 Tr. 229). She did not include that this was also at the beginning of phase II (2001 Tr. 230). She did not include much of the progress Mr. Bernat ultimately made before completing the program, only summarizing his efforts as "he apparently impressed upon the therapist that he had made enough progress that he completed." (2001 Tr. 231).

Ms. Kelly asked Mr. Bernat what he intended to do regarding sex when he was released (2001 Tr. 206-207). Ms. Kelly said that Mr. Bernat replied that he would either go to prostitutes or would go to bars, get women drunk and have sex with them (2001 Tr. 206-207). She said that Mr. Bernat referred to the letter as manipulation and getting in through the back door (2001 Tr. 207). Ms. Kelly interpreted Mr. Bernat's response to indicate an intention to get women "intoxicated to the point where they would have to give in to him." (2001 Tr. 214).

Dawn Harrelson, Mr. Bernat's niece, went to Mr. Bernat's house in 1983, when she was thirteen years old (Tr. 198, 200). Her father and brother were to come over later (Tr. 201). Ms. Harrelson testified that while they were alone, Mr. Bernat took her to the bedroom and showed her a unicorn (Tr. 202). Afterwards, he pulled her on top of him on the bed and simulated sex with her (Tr. 203-204). Ms. Harrelson did not tell her father, but she told her cousin Cheryl about two months later (Tr. 206). Ms. Harrelson testified that she was prompted to tell when Cheryl learned that Mr. Bernat was supposed to come to the house and told Ms. Harrelson not to leave him alone with her daughters (Tr. 206-208).

The State hired a Nebraska psychiatrist, Dr. Terry Davis, to perform a sexually violent predator evaluation of Mr. Bernat (Tr. 227-228, 318). He has done seven evaluations, hired by the Attorney General's office each time, and has

found the person in five of them to meet the statutory definition of a sexually violent predator (Tr. 238, 318). He believed that Mr. Bernat is a sexually violent predator (Tr. 249). He believed Mr. Bernat has a mental abnormality, paraphilia NOS, an abnormal sexual attraction to non-consenting persons (Tr. 251-252, 254). Dr. Davis said that Mr. Bernat began having sexual fantasies about using force and control against women beginning in 1961 by forcing his wife to have sex during their marriage (Tr. 258). Mr. Bernat needed to be in control of the relationship believing that because he earned the money and paid the bills, his wife owed him sex (Tr. 258). Although Dr. Davis formed his opinion without being aware of the allegations that Mr. Bernat touched his daughter's vagina when she was eleven years old, that he simulated sex on his daughter's thirteen year old friend in front of his daughter, and that he simulated sex with Ms. Harrelson, he said these allegations reinforced his opinion (Tr. 267-271). Dr. Davis also relied upon the power reassurance rape typology contained in Ms. Kelly's EOC report (Tr. 259-260). The doctor relied upon Ms. Kelly's report that Mr. Bernat stated that he had not given any thought to having healthy relationships (Tr. 262-263). Dr. Davis interpreted this to mean that there was no mutuality in the sexual relationship (Tr. 263). What Ms. Kelly actually asked Mr. Bernat was, "do you think you have normal healthy relationships?" (Tr. 351). Mr. Bernat replied, "Not much." (Tr. 351). Mr. Bernat had a consensual

relationship on parole with a woman he met in church, which broke up when a police officer asked the woman during a traffic stop if she was aware that Mr. Bernat was a rapist (Tr. 352-353). What Dr. Davis considered important about that was Mr. Bernat's comment that if the woman could not deal with "a little thing like my rape charge," the relationship would not have worked out (Tr. 353). Dr. Davis thought Mr. Bernat's comment about his rape charge being "a little thing" showed his mindset and that he did not take it seriously (Tr. 354). The doctor also relied upon Ms. Kelly's assertion in the EOC report that after his release from prison Mr. Bernat intended to have sex with women whether they wanted it or not by getting them drunk (Tr. 348-349). He also thought that patronizing prostitutes was too risky and improper advice from a therapist (Tr. 294). Dr. Davis relied upon Mr. Bernat's fantasies about women being unable to pay for the repairs he made to their cars as a mechanic, and they would have sex with him in exchange for the bill (Tr. 286-287). Dr. Davis interpreted this to mean that Mr. Bernat was fantasizing about forcing women into nonconsensual sex (Tr. 286-287).

Dr. Davis reached his conclusion by assuming that Ms. Little was telling the truth that she was raped at gun point (Tr. 274). He credited her account because she consistently told the same story while Mr. Bernat's version changed (Tr. 274). Mr. Bernat said that Ms. Little was a prostitute that he paid seventy-

five dollars to for sex, and that Ms. Little owed him forty dollars for a hotel room bill that she traded for sex (Tr. 281). Dr. Davis accepted that Ms. Little "arguably" had an interest in the outcome, but since Mr. Bernat was the one with the most to lose he was the most likely to try to make things look favorable to him (Tr. 281-282). Dr. Davis said that just because Mr. Bernat was acquitted did not mean that he did not rape Ms. Little (Tr. 275). He added that even if the incident occurred as Mr. Bernat described, he still concluded that the incident demonstrated a mental abnormality (Tr. 283-284). Mr. Bernat had indicated that he and Ms. Little had consensual sex, that she asked him to use a condom but he did not have one and had sex with her anyway, and that when Ms. Little learned that she got mad and accused him of rape (Tr. 283). To Dr. Davis that, "shows the lack of [Mr. Bernat's] control and his intention to seek gratification however he will." (Tr. 284).

These same factors caused Dr. Davis to testify that Mr. Bernat has serious difficulty controlling his behavior because his mental abnormality by definition makes him seek nonconsensual sex (Tr. 292-293). The doctor also testified that Mr. Bernat is more likely than not to engage in predatory acts of sexual violence in the future if not confined in a secure facility (Tr. 295). His starting place was the generally accepted proposition that the best predictor of future behavior is past behavior, and Mr. Bernat has a long history of urges and behaviors

involving sexual relations with nonconsenting persons (Tr. 296). Dr. Davis believed that Mr. Bernat will not hesitate to use manipulation to get sex, such as picking up drunk women in bars to have sex with (Tr. 296). He believed this showed how little Mr. Bernat learned in MOSOP (Tr. 297).

Dr. Davis also turned to research and actuarial instruments to predict Mr. Bernat's future risk of re-offending in a sexually violent manner (Tr. 298). He said that research reports re-offense rates for rapists from eighteen percent to thirty-nine percent (Tr. 300). Dr. Davis said that Mr. Bernat met a number of criteria related to risk: deviant sexual preferences and stranger victims (Tr. 303-304). And while successful completion of sexual offender treatment generally reduces risk, he believed that this did not apply to Mr. Bernat because he raped Ms. Little after completing treatment and continued to see nothing wrong with going to bars, getting women drunk, and having sex with them (Tr. 306). Dr. Davis gave Mr. Bernat a score on the Rapid Risk Assessment for Sexual Offender Recidivism (RRASOR) which corresponded to low to medium risk of re-offending, and a score on the Static-99 corresponding to a twenty-one percent risk of re-offending within ten years (Tr. 340-341). Mr. Bernat was sixty-four years old at the time of trial, and research indicates a zero re-offense rate for rapists over age sixty-nine (Tr. 247-348). But Dr. Davis countered that research

with Mr. Bernat's statements in the EOC report that he was planning to have sex with women whether they wanted it or not by getting them drunk (Tr. 348-349).

Dr. Richard Scott is the unit director of forensic evaluations in St. Louis for DMH and was assigned to evaluate Mr. Bernat on order of the probate court (Tr. 436, 441). He concluded in 2001 and again in 2003 that Mr. Bernat does not have a mental abnormality under the statute (Tr. 442, 450). He specifically determined whether Mr. Bernat suffers from paraphilia NOS, a diagnosis the doctor has made in the past in other cases (Tr. 452). Dr. Scott told the jurors that Mr. Bernat "did not suffer a mental disorder that was responsible for his sexual offending." (Tr. 450). Dr. Scott concluded after his evaluation that Mr. Bernat likes control, but it is not the control that is sexually arousing for him (Tr. 453). The sexual arousal was not from the inability to consent (Tr. 455). Mr. Bernat is sexually aroused by females (Tr. 455). He prefers family and friends because his authority, size, and relationship allow him to take advantage of the women (Tr. 455). For Mr. Bernat the issue is not lack of consent or force, it is "the assurance that goes along with completing sex with partners." (Tr. 455). Mr. Bernat just wants a guarantee that he will have sex (Tr. 456). That is why Mr. Bernat turned to prostitutes (Tr. 455). Once he paid for sex he will get sex (Tr. 455). Dr. Scott said that Mr. Bernat's behavior was driven by insecurity, immaturity, and a lack of understanding of the impact his behavior had on others (Tr. 455). The

behavior was not driven by sexual gratification (Tr. 455). Dr. Scott said the reported "fantasies" of women trading sex for work on their cars did not relate to Mr. Bernat having sex, but rather the women wanting to have sex with him (Tr. 456). In those "fantasies" the sexual activity was consensual (Tr. 456).

Dr. Scott did not assume that Mr. Bernat had raped Ms. Little (Tr. 457). The Parole Board credited Ms. Little's accusations and terminated Mr. Bernat's parole (Tr. 511). The police, prosecutor, and probable cause hearing judge gave credence to Ms. Little's allegations because charges were filed and a trial was held (Tr. 512-514). But Dr. Scott explained that because the jurors found Mr. Bernat not guilty after a full trial it would be inappropriate and unethical for him to overrule the jury's verdict with an opinion of his own about what really happened (Tr. 526, 568-570). He agreed with the State that an expert can rely on anything "reasonably reliable," but noted that the jury verdict set that standard higher than that and he could not lower the standard and dismiss the verdict of the jurors (Tr. 569).

While Dr. Scott found that Mr. Bernat does not have a mental abnormality, he went on to evaluate Mr. Bernat's risk of re-offending in the future (Tr. 469). He noted that the concept that past behavior is the best predictor of future behavior was first published in 1911 (Tr. 469). Dr. Scott noted that human beings, fortunately, are more complicated than that (Tr. 470). People have the

capacity to change and it is not true that a person is more likely to repeat past behavior (Tr. 470). It must be determined how much the past behavior contributes to future behavior (Tr. 470).

Dr. Scott scored Mr. Bernat on the Static-99, but then reduced the percentage of risk because Mr. Bernat was in the community for three to three and a half years without re-offending (Tr. 472, 479-480). Dr. Hanson, the developer of the Static-99, studied persons in the community for a period of years and found that five years in the community without re-offending reduces risk by half (Tr. 480). Dr. Scott used a figure between that supplied by Dr. Hanson for reduction in risk over two and four years to estimate a final score for Mr. Bernat on the instrument (Tr. 480). He concluded that the Static-99 resulted in an assessment of twenty-four to thirty-one percent risk of re-offense (Tr. 480). Dr. Scott also scored Mr. Bernat on the MnSOST-R, but gave it less weight because it has less supporting research (Tr. 489). Mr. Bernat's score on that instrument was associated with low risk (Tr. 490).

Dr. Scott then turned to identified factors to increase or decrease the "anchor" point established by the actuarial scores (Tr. 480-481). He noted that Mr. Bernat would be released without supervision (Tr. 481). That factor is not very predictive of future offending but does raise risk slightly (Tr. 481). Mr. Bernat had a problem with his temper in the past but did not seem so currently,

and Dr. Scott could not say if this factor increased Mr. Bernat's risk (Tr. 481-482). Most other applicable factors were accounted for in the Static-99 (Tr. 482-483). One factor reducing Mr. Bernat's risk of re-offending was his advanced age (Tr. 485). Research shows that after age fifty the likelihood of re-offense is "very, very small," and no rapists re-offended after age sixty (Tr. 485). Successful completion of sex offender treatment also reduces risk (Tr. 491). Recent research has shown that the type of treatment used in the last ten to fifteen years is effective in reducing risk to re-offend (Tr. 491). Mr. Bernat successfully completed treatment so he is less likely to re-offend (Tr. 491). Dr. Scott concluded that Mr. Bernat's risk to re-offend in a sexually violent manner was not high enough to say to a reasonable degree of certainty that he was more likely than not to re-offend (Tr. 494-495).

Jane Wurst and Nancy Crump are security aides at the Missouri Sexual Offender Treatment Center where Mr. Bernat was being held pending trial (Tr. 415-416, 423, 431-432). Ms. Wurst had known Mr. Bernat for three years, since he was detained at the facility, and Ms. Crump had known him for the two years she had worked at the facility (Tr. 416-417, 432). Mr. Bernat's behavior has earned him the rights and privileges of the highest level rating given for following the rules (Tr. 417-418). Mr. Bernat has never received a violation in the unit (Tr. 420, 432). Neither woman has ever observed Mr. Bernat to behave in a

sexually inappropriate manner, nor has either of them been afraid or uncomfortable around Mr. Bernat (Tr. 422, 433).

Mr. Bernat filed a motion prior to trial to preclude the State from calling him as a witness at trial, and to preclude the State from using his exercise of his right to remain silent against him during the trial (L.F. 78-83). He particularly noted that persons whose commitment was being sought under the general civil commitment statutes are provided the right to remain silent in Section 632.335 (L.F. 82). The probate court overruled Mr. Bernat's motion (L.F. 4).

The State began the final phase of its closing argument to the jurors by reminding them that Mr. Bernat's counsel indicated in opening statement that he would show that Mr. Bernat had changed (Tr. 610). Indeed, Mr. Bernat's counsel told the jurors in opening statement that the case was about change (Tr. 186). He could make that claim because "that's what the experts are going to tell you about." (Tr. 187). Counsel told the jurors that the evidence would show that Mr. Bernat changed by completing MOSOP and addressing his problems (Tr. 189-190, 192). He said that Mr. Bernat "has changed enough [through MOSOP] to make these kinds of realizations." (Tr. 193). Counsel said another change was Mr. Bernat's more advanced age, which would be shown by research regarding age-related risk assessments (Tr. 192).

The State asked the jurors rhetorically, "Mr. Bernat changed?" (Tr. 611). It then asked the jurors, "Did you get to judge his credibility about how he changed? Did he get up and testify?" (Tr. 611). Mr. Bernat objected, noting that the State can call the opposing party in a civil, adversarial case (Tr. 611). The State responded that the adversarial party is never available to the other party as a witness (Tr. 611-612). The court asked the State if it was suggesting that it could not call Mr. Bernat as a witness (Tr. 612). The State agreed that it could have called Mr. Bernat as a witness but suggested that was "not the point" (Tr. 612). The State's point was that "if we don't call him then there's an adverse inference." (Tr. 612). The probate court overruled Mr. Bernat's objection but instructed the jurors that the State could have called Mr. Bernat as a witness (Tr. 613).

The State acknowledged to the jurors that it could have called Mr. Bernat as a witness, but it was not going to call him to the stand because he had not told the truth to anyone else (Tr. 613). It also told the jurors that Mr. Bernat's counsel could have put him on the stand to talk about the changes but did not do so (Tr. 613). The court overruled Mr. Bernat's objection to the State's argument (Tr. 613). The State told the jurors, "You can consider that when you determine whether or not Mr. Bernat has changed." (Tr. 613). The State pointed out, "You haven't seen him get up here and seen him look you in the eye and tell you what he has

changed." (Tr. 616). Mr. Bernat objected to the State shifting the burden to him and arguing that he had to defend himself (Tr. 616). Without waiting for a ruling, the State told the jurors that it didn't mean "to imply that he has, but we presumed that he's going to show he's changed and he doesn't call his client to prove that. You can consider that as evidence." (Tr. 616).

The jurors returned a verdict finding Mr. Bernat a sexually violent predator (Sup.L.F. 1). The probate court ordered Mr. Bernat committed to the custody of the director of DMH for control, care and treatment until his mental abnormality has so changed that he is safe to be at large (L.F. 137).

POINTS RELIED ON

I.

The probate court plainly erred in denying Mr. Bernat's motion to preclude the State from calling him as a witness or using his right to remain silent against him, in violation of Mr. Bernat's right to Equal Protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that persons the State is seeking to civilly commit under the general civil commitment statutes are provided a right to remain silent at trial by Section 632.335, RSMo 2000, and the State did not, and cannot show a compelling state interest in treating Mr. Bernat differently than other persons similarly situated.

Baxstrom v. Harold, 383 U.S. 107, 86 S.Ct. 760, ___ L.Ed.2d ___ (1966);

Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, ___ L.Ed.2d ___ (1981);

Ex parte Wilson, 48 S.W.2d 919 (Mo. banc 1932);

In the Matter of the Care and Treatment of Norton, 123 S.W.3d 170 (Mo. banc 2004);

U.S. Constitution, Fourteenth Amendment;

Mo. Constitution, Article I, Section 2; and

Section 632.335, RSMo 2000.

II.

The probate court abused its discretion in permitting the State to read into evidence, over Mr. Bernat's objection, the testimony of Linda Kelly, in violation of Mr. Bernat's rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Ms. Kelly was not qualified to diagnose or testify regarding the existence of a mental abnormality causing Mr. Bernat to meet the definition of a sexually violent predator.

In the Care and Treatment of Spencer, 103 S.W.3d 407 (Mo. App., S.D. 2003);

Johnson v. State, 58 S.W.3d 496 (Mo. banc 2001);

Whitnell v. State, 129 S.W.3d 409 (Mo. App., E.D. 2004);

U.S. Constitution, Fourteenth Amendment;

Mo. Constitution, Article I, Section 10;

Section 337.600, RSMo 2000;

Section 632.005, RSMo 2000;

Section 632.483, RSMo 2000;

Section 632.483, RSMo Cum. Supp. 2003; and

Section 632.489, RSMo 2000.

ARGUMENT

I.

The probate court plainly erred in denying Mr. Bernat's motion to preclude the State from calling him as a witness or using his right to remain silent against him, in violation of Mr. Bernat's right to Equal Protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that persons the State is seeking to civilly commit under the general civil commitment statutes are provided a right to remain silent at trial by Section 632.335, RSMo 2000, and the State did not, and cannot show a compelling state interest in treating Mr. Bernat differently than other persons similarly situated.

Section 632.335.2(4), RSMo 2000 provides that a person whose commitment is sought under Missouri's general involuntary civil commitment law has the right to remain silent at trial. Although no similar statutory right is provided in Missouri's sexually violent predator law, Mr. Bernat sought the same protection during his civil commitment trial under the Equal Protection clauses of the United States and Missouri Constitutions (L.F. 78-83). The probate court denied that right to Mr. Bernat (L.F. 4). The State made no attempt to call Mr. Bernat as a witness at trial, choosing instead to ask the jurors to draw an adverse inference

that Mr. Bernat did not testify because his testimony would establish that he fit the definition of a sexually violent predator (Tr. 611-613, 616). Mr. Bernat's motion was not rendered moot by the State's election not to call him as a witness. Mr. Bernat also sought in his motion the full protection of his right to remain silent by precluding the State from using his exercise of his right against him at trial (L.F. 78). When the right to silence is invoked in a criminal case, there is no question that it is error to allude, directly or indirectly, to the person's refusal to testify on his own behalf. ***State v. Barnum***, 14 S.W.3d 587, 592 (Mo. banc 2000). This portion of Mr. Bernat's right to remain silent was also violated by the probate court's ruling.

Equal protection does not require that all persons be dealt with identically, but does require that a distinction made has some relevance to the purpose for which the classification is made. ***Baxstrom v. Harold***, 383 U.S. 107, 111, 86 S.Ct. 760, 763, ___ L.Ed.2d ___ (1966). And certainly, a legislature is free to recognize degrees of harm and may confine its restrictions to those classes where the need is deemed the clearest. ***State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County***, 309 U.S. 270, 275, 60 S.Ct. 523, 526, ___ L.Ed.2d ___ (1940). But, "[e]qual protection of the law means equal security or burden under the laws to every one similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or

classes of persons in the same place or under like circumstances." ***Ex parte Wilson***, 48 S.W.2d 919, 921 (Mo. 1932).

In determining whether a statute violates the Equal Protection clause, one consideration is whether the classification impinges on a fundamental right. ***In the Matter of the Care and Treatment of Norton***, 123 S.W.3d 170, 173 (Mo. banc 2004). Civil commitment of persons classified as sexually violent predators impinges on the fundamental right of liberty. ***Id***. Thus, strict scrutiny applies to Mr. Bernat's equal protection challenge. ***Id***. "To pass strict scrutiny review, a governmental intrusion must be justified by a 'compelling state interest' and must be narrowly drawn to express the compelling state interest at stake." ***Id***.

The State offers a myriad of interests that it claims compel denying Mr. Bernat the right to remain silent at trial. In fact, none of the offers are compelling or narrowly drawn. The first offer is that "The State has a compelling interest in protecting the public from crime." (State's Brief in ED No. 83299, page 7). Protecting the public from crime may be more compelling than, say, protecting the public from unpopular ideas, but it is an extraordinarily expansive justification that would allow many impermissible deprivations. This is nothing more than an expression of general public policy.

The State offers the interest in "securing the cooperation of alleged sexual predators to diagnose and treat their unusually intractable mental illnesses,"

citing ***In re the Personal Restraint Petition of Young***, 857 P.2d 989 (Wash 1993). (State's Brief in ED No. 83299, page 7). Several reasons render this "interest" insufficiently compelling to deny Mr. Bernat the right to remain silent at trial. The State of Washington reviews its involuntary commitment laws using the rational basis test which upholds a classification unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives. ***Abolafya v. State***, 56 P.3d 608, 612 (Wash. App., 2002). A "good reason" is not a compelling state interest. ***Norton, supra***. And a classification that may satisfy legitimate state objectives is not necessarily narrowly drawn to express a compelling state interest. ***Id***. The higher level of scrutiny and the higher burden imposed on the Missouri classification will not permit the same result here as in ***Young***.

The "good reason" identified by the ***Young*** court was that there are differences between the information necessary to diagnose mental conditions and the treatment methods involved with general civil commitments and sexually violent predator commitments. 857 P.2d at 1014. The Washington court therefore concluded that the person's "cooperation with the diagnosis and treatment procedures is essential." ***Id***. This analysis does not compel the same result in Mr. Bernat's case. The claimed right to silence in ***Young*** was directed at the requirement that the person submit to an interview by a psychiatrist or psychologist. ***Id***. at 1013. The diagnosis of mental condition in Mr. Bernat's case

was completed before trial, and Mr. Bernat's claim was for a right to silence *at trial*. And the method of treatment that may be used if Mr. Bernat is found to be a sexually violent predator is irrelevant to the juror's consideration. Compelling Mr. Bernat to testify at trial serves no purpose in this regard.

The State's final "offer" is that denying Mr. Bernat the right to remain silent "enhances the reliability of the decision making…." (State's Brief in ED No. 83299, page 10). The first three cases cited by the State in support of this "offer" miss the mark. The State again cites ***Young, supra***. But that case involves whether the person must submit to an evaluation. The State further cites ***Allen v. Illinois***, 478 U.S. 364, 366, 106 S.Ct. 2988, 2990, 92 L.Ed.2d 296 (1986), and ***In re Hay***, 953 P.2d 666, 679-680 (Kan. 1998). These cases involved challenges to the admission into evidence of statements the person made to the examining psychologist during the sexually violent predator evaluation, and do not involve calling the person as a witness at trial or commenting on his silence. They are irrelevant to the issue in Mr. Bernat's appeal.

The only case cited by the State that involves the person's right to remain silent at trial is ***People v. Leonard***, 93 Cal.Rptr.2d 180, 188-191 (3rd Dist. 2000), where the State called Leonard as a witness at trial. (State's Brief in ED No. 83299, page 10). But the State of Missouri failed to invoke the most salient feature of ***Leonard*** to warrant application of the principle in that case: unlike State of

California, the Missouri Assistant Attorney General did not provide the testimony to the jurors for their consideration because he chose not to call Mr. Bernat as a witness. The State cannot legitimately suggest that it has a compelling interest in presenting testimony to enhance the reliability of the decision making when it chooses not to present the testimony. The State was not interested in enhancing the reliability of the decision, it was only interested in the favorable advantage it could take by not presenting the testimony. The State's position below was: "[C]an we call him. Yes, sir, but if we don't call him, then there is an adverse inference." (Tr. 612). The State's election to forego evidence is fatal to its claim that it has a compelling interest in presenting evidence to enhance the reliability of the decision making process.

In fact, this is the best proof that there is no compelling state interest in denying Mr. Bernat the right to remain silent. After defeating Mr. Bernat's claim of that right, *the State did not call him as a witness at trial*. Nor has the State called the respondent in every sexually violent predator case tried so far in this state. How, then, can the State now claim that it has a compelling state interest in denying Mr. Bernat the right to remain silent at trial if his testimony at trial is unnecessary to win his commitment? The deprivation of the same right to silence given to other civilly committed persons serves no compelling state interest and denies equal protection of the law.

Other States reject the notion that depriving a person subject to civil commitment as a sexually violent predator of the right to remain silent is either essential or compelling. For instance, individuals are given the statutory right to remain silent during sexually violent predator proceedings in Wisconsin, ***Commitment of Murford***, 674 N.W.2d 349 (Wisc. 2004); and Illinois, ***Detention of Trevino***, 740 N.E.2d 810 (Ill. App., 2000). Obviously, these states do believe there is a compelling state interest in denying the person the right to remain silent in a sexually violent predator proceeding.

In the prior oral argument of this case before this Court on May 3, 2005, the State argued that its "compelling interest" is to encourage the individual to take the stand and testify so that the jurors get the decision right. The State's argument suggests that Mr. Bernat therefore assumes the risk of an inference against him if he doesn't testify before the jurors, if he doesn't help them reach the right decision. Mr. Bernat does not have to convince the jurors that he is not a sexually violent predator. The State must prove to the jurors beyond a reasonable doubt that he is. The State should not be permitted to avoid this obligation by compelling the individual to take the stand and defend himself.

Mr. Bernat recognizes that the State did not seek to compel him to testify at trial. It only commented on his failure to testify and called upon the jurors to draw an adverse inference from the fact that he did not do so. As a general rule

in civil cases a party may comment on the opposing party's failure to testify and argue an adverse inference. ***Pasternak v. Mashak***, 428 S.W.2d 565, 568 (Mo. 1967). But also as a general rule, a party to a civil case does not have the right to remain silent and not testify. If the party elects not to testify, the opposing party may bring that, and its meaning, to the attention of the jurors.

The inapplicability of the general civil rules for compelling an adverse party to be a witness or commenting on an adverse party's failure to testify is demonstrated by the right to silence given in the general civil detention statute, Section 632.335.2(4). As a general rule, a party to a civil action has the statutory authority to call the adverse party as a witness. Section 491.030, RSMo2000. But the legislature eliminated this right when it provided the person in a civil commitment preceding the right to remain silent at trial in Section 632.335.2(4). The petitioner under the general civil commitment proceedings does not have the right under Section 491.030 to call the respondent as a witness.

Nor does Section 491.030 extend that right to the State in a sexually violent predator commitment proceeding. Mr. Bernat is claiming the same right to silence given to other persons subject to the civil commitment proceedings under Chapter 632. Because the Equal Protection clause extends to Mr. Bernat the same right to silence given to other persons under Chapter 632, the elimination by Section 632.335.2(4) of the general right to call an adverse witness in a civil case

under Section 491.030 is similarly eliminated in a sexually violent predator case. The general right to call an adverse witness in a civil case is irrelevant to this appeal.

Permitting an adverse inference against a party for failing to defend himself may be acceptable in a typical civil suit where he may be compelled to pay money damages, to perform a contract, or to deliver property, but it is unjustifiable in a civil setting where the person can be deprived of his liberty. This liberty interest is what distinguishes this case from a typical civil case. Civil parties lose their liberty only under Chapter 632 and Chapter 211, relating to juvenile courts. Section 632.335.2(4) provides a civil detention respondent the right to remain silent. A juvenile has the right to remain silent. Section 211.059, RSMo 2000.

When Missouri attempts to deprive its citizens of their liberty, it assumes this responsibility upon itself, it does not compel the person to risk losing his liberty because he chooses not to take the stand and testify. A criminal defendant does not have to take the stand to defend himself or suffer an adverse inference. Missouri Constitution, Article I, Section 19. A juvenile does not have to take the stand to defend himself or suffer an adverse inference. Section 211.059. A general civil commitment respondent does not have to take the stand to defend himself or suffer an adverse inference. Section 632.335.2(4). These

rights to remain silent do not enhance the reliability of the decisions in those cases, but "ours is an accusatorial and not inquisitorial system – a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." ***Rogers v. Richmond***, 365 U.S. 534, 541, 81 S.Ct. 735, 739, ___ L.Ed.2d ___ (1961); cited in ***Allen***, 478 U.S. at 375, 106 S.Ct. at 2995. The State violates this system when it seeks to coerce Mr. Bernat to take the stand and defend himself or face consequences from his failure to do so.

Leonard, relied upon by the State for its argument in favor of the alleged compelling interest in enhancing the reliability of the fact finding process, relied upon ***Allen***, ***supra***. 93 Cal.Rptr. 2nd at 188-190. ***Allen***, in turn, relied upon ***Mathews v. Eldridge***, 242 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), to find this "enhancement of the fact finding process" element. 478 U.S. at 375, 106 S.Ct. at 2995. It cannot be ignored that the United States Supreme Court stated in ***Mathews*** that the degree of potential deprivation that may be created by a particular decision must be considered in assessing what procedure is required. 424 U.S. at 343, 96 S.Ct. at 906. The potential deprivation in ***Mathews***, the loss of social security benefits, is substantially less than that in a sexually violent predator case, the loss of liberty, perhaps for life.

Mr. Bernat has a *right* not to testify at trial derived from Chapter 632 of the Missouri statutes and made applicable to him by the Equal Protection clause of the constitutions of the United States and the State of Missouri. This is not the situation in a general civil case. In this regard, his right not to testify is more like that in a criminal case where the defendant has a right to remain silent at trial, which is derived from the Fifth Amendment of the United States Constitution and Article I, Section 19 of the Missouri Constitution. Regardless of the source, both the SVP respondent and the criminal defendant have a *right* to remain silent at trial. That right is fulfilled only when the person is allowed "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty … for such silence." ***Estelle v. Smith***, 451 U.S. 454, 467-468, 101 S.Ct. 1866, 1875, ___ L.Ed.2d ___ (1981). Mr. Bernat also has a right not to testify at trial, and the general rule of permitting comment and inference from a party's failure to testify violates the same purpose for the prohibition in ***Barnum*** by focusing the juror's attention on Mr. Bernat's exercise of that right. The general civil rule has no applicability under these circumstances.

The Eastern District Court of Appeals previously transferred this appeal to this Court because the Eastern District interpreted Mr. Bernat's claim to be a challenge to the constitutionality of the sexually violent predator statutes. ***In the Matter of the Care and Treatment of Bernat***, 167 S.W.3d 717 (Mo. banc 2005).

This Court disagreed. ***Id***. This may leave open the question of whether it was necessary for Mr. Bernat to challenge the constitutionality of the statutes in order to claim an Equal Protection violation in denying him the right to remain silent and not having that silence used against him. Mr. Bernat does not believe that it was necessary for him to do so.

While the sexually violent predator statutes do not provide a right to remain silent, they also do not specifically deny him that right, or specifically permit the State to call him as a witness at trial. Absent a statutory provision permitting the State to call the respondent as a witness, the statute does not have to be invalidated to extend to Mr. Bernat, pursuant to the Equal Protection clause, the additional right to silence provided elsewhere in Chapter 632. The appellant ***Norton*** alleged on appeal that the probate court erred "by not allowing consideration of less restrictive alternatives to the 'secure confinement' of those adjudicated as sexually violent predators" required in Section 632.495. 123 S.W.3d at 174. Norton argued that the Equal Protection clause required access to less restrictive alternatives provided in Section 632.355, RSMo 2000. ***Id***. This Court considered whether the Equal Protection clause required extension of that right to sexually violent predators, and concluded that the distinction between the statutes comported with equal protection because it was supported by a narrowly tailored statutory scheme to promote a compelling state interest. ***Id***. at

175. This Court decided the issue on the merits, it did not reject, or dismiss, Norton's claim because he failed to challenge the constitutionality of Section 632.495 on the basis that it did not include the rights provided in Section 632.355. Mr. Bernat's appeal invokes the same review by this Court. It is unnecessary for him to make a challenge to the constitutionality of the SVP statutes.

The probate court's order denied Mr. Bernat equal protection of the law. The judgment committing Mr. Bernat to secure confinement in the custody of DMH must be reversed and the cause remanded for a new trial where the State will be precluded both from calling him as a witness and arguing an adverse inference from his exercise of his right to remain silent.

II.

The probate court abused its discretion in permitting the State to read into evidence, over Mr. Bernat's objection, the testimony of Linda Kelly, in violation of Mr. Bernat's rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Ms. Kelly was not qualified to diagnose or testify regarding the existence of a mental abnormality causing Mr. Bernat to meet the definition of a sexually violent predator.

The State's petition was initially tried from October 30 to November 1, 2001 (L.F. 5). Linda Kelly is a licensed clinical social worker conducting End of Confinement reports for the Department of Corrections (2001 Tr. 196-197). Those reports are prepared and submitted to the Office of the Attorney General pursuant to Section 632.483, RSMo 2000. The State asked her at that trial if she had reached "an opinion to a reasonable degree of scientific certainty as to whether or not Mr. Bernat suffered from a mental abnormality?" (2001 Tr. 200). Ms. Kelly answered that she had, and that in her opinion Mr. Bernat suffered from paraphilia NOS (2001 Tr. 200). She went on to testify regarding the basis of her opinion (2001 Tr. 200-236).

The first trial ended in a mistrial when the jurors were unable to reach a unanimous verdict (L.F. 5). The case was retried in June of 2003 (Tr. 2). Mr.

Bernat objected when the State sought to read the testimony of Linda Kelly at the first trial during the second trial (Tr. 210-214). He noted that Section 632.483 had been amended since the first trial to require that a psychologist or psychiatrist evaluate a person for referral to the Attorney General's office for further proceedings (Tr. 215-217). He argued that this requirement should extend to the level of trial as well, and that he should get the benefit of the change in the law (Tr. 216-217). Mr. Bernat suggested that Ms. Kelly's testimony should be excluded because she is a licensed clinical social worker, not a psychiatrist or psychologist (Tr. 21-214). The probate court overruled the objection and admitted the testimony because the statute does not say anything about what is admissible at trial (Tr. 217-218).

It is within the trial court's discretion to admit or exclude testimony. ***Johnson v. State***, 58 S.W.3d 496, 499 (Mo. banc 2001). A reviewing court will not interfere with the trial court's ruling unless an abuse of that discretion is plainly shown. ***Whitnell v. State***, 129 S.W.3d 409, 413 (Mo. App., E.D. 2004). The probate court abused its discretion in admitting Ms. Kelly's testimony in the 2003 trial.

After the first trial, but before the second, the legislature amended Section 632.483. Both versions provide that when it appears that a person may meet the criteria of a sexually violent predator, the agency with jurisdiction – in this

instance the Department of Corrections – shall give written notice of such to the Attorney General. Section 632.483.1. But the legislature amended the statute in 2002 to require that such notice include "[a] determination by either a psychiatrist or psychologist as defined in section 632.005 as to whether the person meets the definition of a sexually violent predator." Section 632.483.2(3), RSMo Cum. Supp. 2003. Mr. Bernat argued at trial that this amendment should be applied to require the opinion to be expressed by either a psychiatrist or psychologist at trial as well, and to exclude the testimony of a person not within the definition of Section 632.005, such as a licensed clinical worker (Tr. 214-218). The trial overruled Mr. Bernat's objection because Section 632.483 is silent on the admission of testimony at trial (Tr. 217-218).

To that extent, the trial court was not wrong. Section 632.483 does not discuss admissibility of testimony at trial. But by the time the probate court made its ruling, Missouri's Supreme Court and appellate courts had established the same minimum requirement on testimony *at trial* as that set out in the statute. ***Johnson***, ***supra***., was decided on November 20, 2001. The DOC employee who prepared the EOC report in ***Johnson*** had a master's degree in counseling and was pursuing a counseling license. 58 S.W.3d at 497. He also testified for the State at trial. ***Id***. The Southern District noted that no statute in the sexually violent predator law limited the qualification of a witness to testify as an

"expert" at trial. ***Id***. at 498. But Section 632.489.4 required examination of the person prior to trial by a psychologist or psychiatrist. ***Id***. The Southern District extended this same requirement to the trial, and held that the State's witness was therefore not qualified to testify as an "expert" at trial regarding a diagnosis of a mental disorder. ***Id***. at 499. Mr. Bernat's argument that the requirements of the amended Section 632.483 extend to the admission of testimony at trial was therefore correct.

Regardless of the amendment of the statute, ***Johnson*** and other cases clearly demonstrate that a licensed clinical social worker is incompetent to express "an opinion … as to whether or not Mr. Bernat suffered from a mental abnormality." (2001 Tr. 200). Because the DOC employee in ***Johnson*** was not a psychiatrist or psychologist as defined in Section 632.005, the Court held that he "should not have been permitted to testify to his 'diagnosis' as 'an expert' at trial." ***Id***. While his experience may have qualified him for other issues, "diagnoses of mental disorders is not even arguably within his area of expertise, and his testimony on that point should have been excluded." ***Id***.

Ms. Kelly is a licensed clinical social worker, and as such she has some statutory authority to make diagnoses. Section 337.600, RSMo 2000. But that qualification remains insufficient to permit her to testify in a sexually violent predator case. Sections 632.483 and 632.489 require the "expert" to be a

psychiatrist or psychologist as defined in Section 632.005. The Southern District applied its holding in ***Johnson*** to find a licensed clinical social worker's testimony inadmissible in ***In the Matter of the Care and Treatment of Spencer***, 103 S.W.3d 407, 409, 415-416 (Mo. App., S.D. 2003). ***Spencer*** was decided on April 29, 2003, before Mr. Bernat's trial.

The probate court abused its discretion when it overruled Mr. Bernat's objection and permitted an unqualified witness to testify as an "expert" expressing an opinion that Mr. Bernat has a mental abnormality subjecting him to secure confinement as a sexually violent predator. Mr. Bernat was prejudiced by that abuse because it shifted the balance in favor of the State in the eyes of the jurors. They heard Dr. Davis and Dr. Scott contradict each other whether Mr. Bernat suffered paraphilia NOS (Tr. 252, 450, 452). The State was allowed to improperly bolster its position with a second opinion from an unqualified, but alleged expert. Ms. Kelly's testimony was clearly inadmissible. The probate court abused its discretion when it admitted the testimony. Under the circumstances of this case, that abuse of discretion mandates a new trial.

Because the probate court abused its discretion in admitting Ms. Kelly's testimony as an "expert" asserting that Mr. Bernat has a mental abnormality necessary for involuntary commitment, the judgment of the probate court must be reversed and the cause remanded for a new trial.

CONCLUSION

Because Mr. Bernat was denied equal protection of the law as set out in Point I, the judgment of the probate court must be reversed and the cause remanded for a new trial. Because the probate court abused its discretion in admitting Ms. Kelly's testimony as an "expert" asserting that Mr. Bernat has a mental abnormality necessary for involuntary commitment, as set out in Point II, the judgment of the probate court must be reversed and the cause remanded for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 9,827 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated on March 1, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of March, 2006, to Trevor S. Bossert, Assistant Attorney General, Laclede Gas Building, 720 Olive Street, Suite 2150, St. Louis, MO 63101.

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Emmett D. Queener

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